FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 76
A765/04

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

THOMAS SHERIDAN

Pursuer and Reclaimer

against

NEWS GROUP NEWSPAPERS LIMITED

Defenders and Respondents

Pursuer and Reclaimer: G Dangerfield (sol adv); Archer Coyle, Glasgow
Defenders and Respondents: R Dunlop QC; Ledingham Chalmers LLP

11 December 2018

Introduction

[1] This reclaiming motion concerns whether, following an unsuccessful motion by a defender for a new trial (appeal), interest should be allowed on the damages awarded by the jury from the time when, but for the appellate proceedings, interest would have been applied.

Background

Procedure

[2] On 14 November 2004, the defenders published an article in their News of the World newspaper which contained a number of allegations concerning the pursuer's private life. On 23 November 2004, the pursuer raised an action of defamation. On 4 August 2006, after a trial which lasted five weeks, the jury returned a verdict in the pursuer's favour and assessed damages at £200,000. Had matters rested there, after the expiry of 7 days, the pursuer would have been entitled to enrol a motion to apply the jury's verdict (Rules of the Court of Session, rule 37.10). The effect of that would have been that he would have obtained decree for the damages awarded and interest would have run at least from the date of that decree at the judicial rate of 8% per annum (RCS 7.7).

[3] In the interim, the defenders enrolled a motion for a new trial under section 29(1) of the Court of Session Act 1988 (RCS 39.1). That had the effect of postponing any further procedure at first instance, including the motion for application of the jury's verdict, until the appellate proceedings were determined. A Summar Roll hearing was fixed for 4 December 2007. Meantime, the defenders came across material (see *infra*) which suggested that the pursuer may have committed perjury at the trial. This prompted a minute averring *res noviter*. The alleged perjury was reported to the police. On 25 September 2007, the Summar Roll was discharged and the cause was sisted pending criminal investigation. The sist had been requested by the Lord Advocate, who had intervened in the process, on the grounds that further inquiries in the civil process could prejudice that investigation. The pursuer had opposed the sist, but the defenders had been content with it.

[4] On 23 December 2010, after a 12 week trial at the High Court in Glasgow, the pursuer was convicted of perjury. Leave to appeal was eventually refused at second sift on

2 August 2011. The pursuer applied to the Scottish Criminal Cases Review Commission for his case to be referred to the appellate jurisdiction of the High Court. On 14 February 2012, the pursuer resisted a motion by the defenders to recall the sist on the basis that he was attempting to have his conviction quashed. In May 2015 the SCCRC declined to refer the case. That decision, and another dated 27 May 2016, were the subject of an unsuccessful judicial review ([2018] CSOH 69) but that is currently the subject of a reclaiming motion (appeal). On 17 September 2015 the sist was recalled. A new Summar Roll hearing, before an Extra Division, was fixed for 10 May 2016 for three days. On 12 May 2016, the court made *avizandum*.

[5] By interlocutor dated 19 August 2016, the motion for a new trial was refused. An application for permission to appeal to the United Kingdom Supreme Court followed. This was refused on 3 November 2016. It was only on 22 September 2017 that the Extra Division finally dealt with the expenses of the motion for a new trial. The pursuer eventually re-enrolled to apply the jury's verdict and for interest at the judicial rate from 14 November 2004. This application was heard on 3 November 2017. On 8 March 2018, the Lord Ordinary applied the verdict. He refused to award any interest on the damages which the jury had assessed almost ten years previously. It is against that interlocutor that the pursuer reclaims.

The Civil and Criminal Trials

[6] It is sufficient simply to set out the issue and counter-issue in order to illustrate the scope of the civil trial. The issue was:

> "Whether the statements in the articles ... falsely and calumniously said that the pursuer committed adultery (with [FM], [AK], and unnamed individuals); that he was a 'swinger' and that he participated in orgies; and whilst he claimed to be teetotal drank champagne; meaning thereby that he was a hypocrite and an abuser of

> his position of power as a party leader [of the Scottish Socialist Party] to the loss, injury and damage of the pursuer."

The counter-issue was:

> "Whether it is true that the pursuer committed adultery (with [FM], [AK] and other unnamed individuals), that he was a 'swinger', that he participated in orgies, that whilst he claimed to be teetotal he drank champagne; meaning thereby that he was a hypocrite and an abuser of his position of power as a party leader."

[7] The Lord Ordinary directed the jury in relation to the options open to them. He told them that, where some of the allegations were established and others were not, the jury would have to ask themselves another question, *viz*.:

> "Standing what the true state of [the pursuer's] reputation ought to be in the light of the charges that have been established, do the words used which have not been established still materially injure his reputation?"

The jury were asked to answer the issue and counter-issue as they stood. They ultimately answered the issue "yes" and the counter-issue "no" and assessed damages accordingly.

[8] After the case had been appointed to the Summar Roll on the motion for a new trial, the defenders came into contact with a former friend of the pursuer, who had a videotape, said to have been made in 2004, on which the pursuer appeared to make certain admissions which contradicted the evidence which he had given during the trial. The defenders had paid £200,000 for the tape. The pursuer questioned the tape's authenticity. Criminal proceedings against the pursuer ensued. The trial took place in 2010. The indictment did not libel that the pursuer had lied about his relationship with FM. It did not contain any charge that he had lied about being teetotal. The jury found the pursuer guilty of falsely deponing that: he had not admitted attending a club in Manchester along with AK; he had denied visiting a club for "swingers"; and he had denied that he had had a sexual relationship with KT. Put another way, the jury in the criminal trial reached a different view

from the civil jury; but only in relation to the pursuer committing adultery with KT and attending the "swingers" club.

The Extra Division (2017 SC 63)

[9] The Extra Division held that, in order to satisfy the test for a new trial under section 29(1) of the 1988 Act, the defenders had to satisfy an overarching test whereby it was "essential to the justice of the cause" that the jury's verdict should be set aside. Although it had been open to the civil jury to conclude that the pursuer had lied about several matters, including his relationship with KT, they would still have been entitled to decide that the unproved claim relating to his relationship with FM was so torrid, lurid and salacious that the article about this materially injured the pursuer's reputation. The jury's affirmative answer to the issue was likely to have been reached by a route which did not turn on the pursuer being totally credible, reliable or faithful.

[10] In the course of their opinion, the Extra Division recognised that there was material to suggest that the defenders had taken steps to ensure that FM would not be available at the original trial, if a prospective motion by the pursuer to recall her had been successful. They may have falsified records in that connection. There was a *prima facie* case that the defenders had engaged in phone tapping. However, no concluded view was reached on the illegality or impropriety of the defenders' conduct. Had that been done, the Extra Division indicated that it may have been fatal to the appellate proceedings. As matters stood, the motion did not establish that a new trial was essential to the justice of the cause.

Application of the verdict (2018 SLT 249)

[11] The principal sum was paid on 30 May 2017. The pursuer sought interest at the

judicial rate of 8% per annum from the original date of publication on 14 November 2004 to the date of the jury's verdict on 4 August 2006 (£27,473). He sought interest at the same rate from the date of the verdict to the date of payment. The defenders maintained that the court had a discretion to award or to refuse interest on damages from a date prior to the final decree. The latter was when the jury's verdict had eventually been applied (ie after the conclusion of the Inner House proceedings in 2017 and not when the verdict had been returned).

[12] The Lord Ordinary observed that the rule at common law was that interest was not payable on damages until the date of decree; since it was only then that the damages became liquid. The date of decree, in a case in which, for example, an appeal had been taken to the House of Lords, was the date on which the judgment of that court was applied by the Court of Session. There was a discretion to award interest from an earlier date in an appeal, but that was not the normal practice. The use of what was a right of appeal, and any delay caused by the appellate process, were not regarded as *per se* unreasonable (see *Wilson* v *Dunbar Bank* 2008 SC 457). Where a jury trial was involved, interest ran only from the decree following application of the verdict (*Macrae* v *Reed and Mallik* 1961 SC 68).

[13] The Lord Ordinary recognised that the common law had been altered by the Interest on Damages (Scotland) Act 1958, which had in turn been amended by the Interest on Damages (Scotland) Act 1971. In terms of section 1(1) of the 1958 Act, the court had a discretion to award interest on damages from the date on which the right of action arose. In respect of personal injuries actions, in terms of section 1(1A), that discretion was to be exercised in favour of a pursuer, in the absence of reasons special to the case.

[14] The Lord Ordinary reasoned that:

> "[51] In the present case, the date of final decree, from which interest should run as a matter of law, is the date on which the verdict is applied. In light of the history of the appeal ... it cannot be said that the defender has caused any unreasonable delay or that there has been wrongful withholding of the debt by the defenders in exercising their right of appeal. The grounds raised were anything but frivolous.
>
> [52] The defenders are not responsible for the time taken to resolve the appeal process and payment of the principal sum. The explanation for that lies in the pursuer's prosecution, arising out of his own conduct, and his subsequent efforts to challenge his conviction.
>
> ...
>
> [53] However, I have a discretion, if acting under section 1(1) of the 1958 Act, to make an award of interest and order that it should run from an appropriate date prior to decree. If acting under section 1(1A), I am bound to do so unless satisfied that there are reasons special to the case why no interest should be given. The decision as to which of the two subsections to act under depends upon whether the damages awarded were in respect of 'personal injuries sustained by the pursuer'."

[15] The Lord Ordinary analysed the definition of personal injuries in section 3(2) of the 1958 Act, the Damages (Scotland) Act 1976 (s 10(1)) and the Administration of Justice Act 1982 (s 13(1)). He noted that the Damages (Scotland) Act 1993 had amended the 1976 and 1982 Acts to include injuries resulting from defamation. The Damages (Scotland) Act 2011 had reinstated the *status quo* as defined in section 3(2) of the 1958 Act. He continued:

> "[55] ... [w]hatever the position was prior to 1993, and whatever the position is now, actions for damages arising as a consequence of defamation which were raised between 1993 and mid-2011 should be treated as actions involving personal injuries, at least for the purposes of the Interest on Damages (Scotland) Act. I must therefore treat the present action as one in which damages have been awarded in respect of personal injuries sustained by the pursuer and proceed to consider the question of interest as directed by section 1(1A) of the 1958 Act."

[16] The Lord Ordinary noted the *dictum* of Lady Paton in *Tait* v *Campbell* 2004 SLT 187 (at para [28]) to the effect that, only in quite exceptional circumstances, should a pursuer suffer a lower award of interest as a result of the passage of time arising from a motion for a

new trial. This case was, however, quite different. He reasoned in relation to the particular circumstances of the case:

> "[57] ... Not only does it concern an award which was, by three times, the highest award ever made in Scotland for defamation, but it was awarded to a pursuer who was subsequently found to have committed perjury of such a serious sort as to warrant a sentence of 3 years' imprisonment. The period of time which has elapsed has been explained by the time taken up with the preparation for his criminal trial, his unsuccessful attempts to challenge that verdict and the hearing of the application for a new civil trial in the Inner House. There can be few other civil cases heard in modern times which have attracted such notoriety. I know of no other case in which a litigant, who sought to vindicate his reputation through an action for defamation, emerged as a criminal convicted of perjury and at the same time secured an award of a very substantial sum of money. To include within the award of damages in the verdict a further £200,632, or a further £173,159, would be a step which many would find difficult to comprehend, not least those who suffered injury to their standing and feelings as a consequence of the pursuer's conduct towards them in court and went uncompensated.
>
> [58] The circumstances associated with this case which I have outlined are, to my mind, self-evidently exceptional. They seem to me to be the sort of circumstances which can be thought of appropriately as being reasons special to the case such as to entitle me to exercise my discretion in favour of declining to make an award of interest to run from any date prior to decree. That is the step which I shall take. Since the principal sum was paid prior to the enrolment of the motion to apply the verdict, I shall make no order for interest."

Notwithstanding the Lord Ordinary's view of the pursuer's conduct during the Outer House proceedings, he awarded expenses in his favour, as the Extra Division had also done in relation to the motion for a new trial.

Submissions

Pursuer

[17] The pursuer first complained (ground of appeal 1) that the Lord Ordinary had erred in carrying out "independent research" when determining that section 1(1A) rather than 1(1) of the 1958 Act applied. Both parties had argued that point on the basis that it was section 1(1) which had been relevant. The Lord Ordinary had erred in not allowing the

parties to make representations about the application of section 1(1A) and the existence of "reasons special to the case". He had nevertheless been correct in applying that section, but wrong in holding that special reasons existed. He ought to have put the case out By Order to hear further submissions.

[18] The Lord Ordinary had then erred (ground 2) in failing to exercise the discretion which was conferred by section 1(1A) in the manner in which it would have been exercised by the Inner House when it issued its judgment in 2016. If the Lord Ordinary had erred in applying section 1(1A), that vitiated his decision and the matter had to be assessed anew (ground 4). In a case where no appeal had been taken, the terms of the final interlocutor and the final decree would be the same. Interest would run *ex lege* at the judicial rate from the final interlocutor. The modern practice was for the Lord Ordinary to deal with interest in that interlocutor.

[19] There had been no precedent, since the passing of the 1958 Act, in which the Inner House, when adhering to a Lord Ordinary's award of damages, had done anything other than award interest at the judicial rate from at least the date of the Lord Ordinary's interlocutor, whether interest had been governed by section 1(1) or section 1(1A). The Act had made it clear that damages would routinely be deemed wrongfully withheld from the date when the right of action arose. It would be absurd if nevertheless they were deemed not to have been wrongfully withheld in the period between the Lord Ordinary's final interlocutor and the disposal of an appeal.

[20] There were two periods during which interest should run. The first was from 14 November 2004 until 4 August 2006. The Lord Ordinary had a discretion to award interest in this period; with which discretion the Inner House should be slow to interfere. The second was from 4 August 2006 until payment. In respect of that period interest should

run at the full judicial rate. This was, in modern times, normal practice following an unsuccessful motion for a new trial, irrespective of which party had sought a new trial (Hajducki: *Civil Jury Trials* (2nd ed) para 22.09; *Tait* v *Campbell* (*supra*)). The jury's verdict ought to be treated in the same way as a Lord Ordinary's determination of the amount of damages. There were no cases in which the court had found "reasons special to the case" to exist other than prior to a final decree.

[21] The issue ought to have sought apportionment of damages into past and future elements but, even where that was not done, the court could award interest (Hajducki (*supra*) at para 22.08; *Ross* v *British Railways Board* 1972 SLT 174). Interest at half the judicial rate should be applied on the whole amount of the award from the date of publication and added to the principal sum, to which interest at the judicial rate should be added from 4 August 2006 to the date of payment on 30 May 2017 (see *Baigent* v *British Broadcasting Corporation* 2001 SC 281; *H* v *H* [2013] CSIH 82 at para [16]; *Farstad Supply* v *Enviroco* 2013 SC 302).

[22] The pursuer's perjury conviction had not undermined the jury's verdict such that it had been essential to the justice of the cause that a new trial should be held. The Lord Ordinary had erred (ground 3) in failing to view the relevance of the conviction through the prism of the Extra Division. The conduct of the defenders had been such that, had the allegations of this conduct been established, the defenders would have been prevented from proceeding with the motion for a new trial. Detailed information on the defenders' behaviour had been made available.

Defenders

[23] The defenders made the general point that the wording of section 1(1) of the 1958 Act

referred to the court which pronounced the interlocutor decerning for payment of damages. The court, in the context of a civil jury trial, was that applying the verdict of the jury. It was for the Lord Ordinary to exercise that discretion and not the Extra Division.

[24] There was no question of the Lord Ordinary failing to give the pursuer an opportunity to make submissions on the question of interest on the basis of section 1(1A) as distinct from 1(1) (ground of appeal 1). The pursuer had relied on *Tait* v *Campbell* (*supra*) which had been based on section 1(1A). In any event, the Lord Ordinary had ruled in the pursuer's favour in determining that section 1(1A) applied. The error made by the Lord Ordinary was entirely in the pursuer's favour.

[25] There was no basis for making a distinction between different periods of interest. Reliance on *Tait* v *Campbell* (*supra*) was misplaced as that was a personal injuries action to which section 1(1A) applied. The present case was not a personal injuries case. The Damages (Scotland) Act 1993 (sch 1, para 3) had added defamation to the definition of "personal injuries" in section 10(1) of the Damages (Scotland) Act 1976. The 1976 Act was concerned with rights transmitted to an executor in respect of a deceased person's injuries (see Scottish Law Commission (Report No. 134) "*The Effects of Death on Damages*", paras 4.29 to 4.36).

[26] There was a discretion vested in the court to allow interest during the course of an appeal where there had been improper conduct (*Clancy* v *Dixon's Ironworks* 1955 SC 17). The discretion to award interest on damages from a date earlier than that of the decree under section 1(1) had to be exercised on a "selective and discriminating basis" (*Macrae* v *Reed and Mallik* (*supra*); *Smith* v *Middleton* 1972 SC 30; *Wilson* v *Dunbar Bank* 2008 SC 457; *Boots the Chemist* v *GA Estates* 1992 SC 485). The court should be reluctant to interfere with a Lord Ordinary's decision on interest (*JM* v *Fife Council* 2009 SC 163). The Lord Ordinary had said

that it was self-evident that there were special circumstances in this case. He was therefore entitled to exercise his discretion in the manner which he did.

[27] Lengthy submissions had been made by both parties about the circumstances of the litigation (ground 3). The various factors founded upon by the Lord Ordinary justified his discretion, even on the basis that there required to be "reasons special to the cause". The pursuer required to demonstrate that the Lord Ordinary exercised his discretion upon a wrong principle or was plainly wrong. It is not sufficient that this court might take a different view (*AppA UK* v *Scottish Daily Record* 2008 SC 145). It was not a valid ground of appeal to complain about the weight attached by the Lord Ordinary to particular factors (*Stevenson* v *Midlothian District Council* 1983 SC (HL) 50). There had been no wrongful withholding of sums by the defenders. The delay had been caused by the perjury proceedings; the action having been sisted at the instance of the Lord Advocate. The defenders' motion to recall the sist had been opposed by the pursuer because of his SCCRC application.

[28] If this court were to exercise its own discretion it would have to decide for itself whether interest should be awarded and at what rate. It would be appropriate for any interest to run at the rate of 4% rather than 8% (*Farstad Supply* v *Enviroco* (*supra*)).

Decision

Independent Research

[29] The superior courts rely heavily on parties' counsel to refer to the relevant law, and any binding authorities (Faculty of Advocates: *Guide to ... Professional Conduct* para 6.1.1). The system is adversarial. Each party should have the opportunity to make submissions in relation to each other's argument and any supporting precedent. That is a feature of the

principle of equality of arms. The court is not directly involved in that equation. It may, or may not, agree with any or all of the parties' submissions. The court does not listen to and adjudicate upon an issue having first deleted any pre-existing understanding of the law. It may, if time permits and the court has advance knowledge of parties' contentions, seek parties' views at the hearing of the appeal on a particular principle or precedent. That was done in this case in relation to the significance of *Boots the Chemist* v *GA Estates* 1992 SC 485. If the court discovers a relevant principle or precedent after having made *avizandum*, it may elect to put the case out By Order to hear further submissions or it may invite written submissions on the matter. This may be appropriate where the court considers that the authority, which has not been referred to, is the key which unlocks the problem. However, a court is seldom bound to do this. It will only be necessary if fairness dictates that course. In the normal case, superior courts in the modern era can be expected to carry out some research of their own (see eg *Hamilton* v *Dumfries and Galloway Council (No. 2)* 2009 SC 277, Lord Reed, delivering the Opinion of the Court, at para [72]) without troubling the parties with the cost and delays inherent in having further hearings. The Lord Ordinary had heard submissions on section 1(1) and he had been referred to cases on section 1(1A). He was entitled to proceed as he did without further ado.

Section 1(1) or 1(1A)

[30] Section 3(2) of the 1958 Act, as introduced by section 1(3) of the 1971 Act provided that:

> "In this Act, 'personal injuries' includes any disease and any impairment of a person's physical or mental condition."

This is a relatively common definition and was included previously in, for example, the Law Reform (Personal Injuries) Act 1948 (s 3) and afterwards in the Prescription and Limitation

(Scotland) Act 1973 (s 22(1)). It appeared also in the Damages (Scotland) Act 1976 (s 10(1)), which had clarified the rights of relatives of persons who had died "in consequence of personal injuries" (s 1). The 1976 Act allowed the rights of such persons, in respect of "personal injuries" sustained before death, to be transmitted to their executors (s 2). This changed the previous law whereby death would end any personal (as distinct from derivative) claims for non-patrimonial loss if no action had been raised prior to death. The new provision enabled an executor to claim this. Section 13(1) of the Administration of Justice Act 1982 contained the same definition of personal injuries. It was concerned with damages for services rendered to persons who had sustained, or died from, "personal injuries" and the deduction (or not) of benefits when assessing damages for personal injuries (ss 8-11).

[31] The Damages (Scotland) Act 1993 amended section 10(1) of the 1976 Act to add to the definition of personal injuries in that Act the words "and injury resulting from defamation or any other verbal injury or other injury to reputation". The 1993 Act was, as its headnote announces, intended to clarify and amend the law in relation to the rights of relatives and executors of deceased persons to claim damages in respect of deaths caused by personal injuries. In its *Report on the Effect of Death on Damages* (SLC No. 134 (1992)) the Scottish Law Commission had been concerned (at para 4.31) about whether the 1976 Act had been intended to apply to actions of defamation such that, contrary to the common law, an executor could raise such an action when the deceased had not done so. The SLC noted (at para 4.32) that it had been assumed in the 1973 Act, following the Faulks Report on Defamation (1975), that "personal injuries did not include defamation". Thus, in the 1973 Act (as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985) limitation in defamation cases (s 18A) is treated separately from personal injuries cases (ss 17

and 18) (although cf *Barclay* v *Chief Constable, Northern Constabulary* 1986 SLT 562 (wrongful arrest)). The SLC recommended (para 4.35) that the right to raise an action of defamation should transmit to an executor but, in respect of non-patrimonial loss, only if an action had already been raised. The SLC thought that it was appropriate that a claim for services might be made in a defamation action and that these ought to transmit to an executor as patrimonial loss. It was for this reason that the amendments to both the 1976 and 1982 Acts were proposed and subsequently enacted. This had no connection with the definition of personal injuries in the 1958 Act, as introduced by the 1971 Act, which remained and remain unamended.

[32] The Damages (Scotland) Act 2011 (sch 1 para 3) restored the original definition in the 1982 Act. This Act was designed to repeal and re-enact the 1976 Act with amendments. It too related to the transmission of rights to executors. Section 2 provided for such transmission. In doing so, it distinguished between "personal injuries" (s 2(1)(a)) and "injuries which, though not personal injuries, are – (i) injuries to name or reputation ..." (s 2(1)(b)(i)). This emphasises, as does *Tudhope* v *Finlay Park* 2004 SLT 783 (Lord Cameron of Lochbroom at para [10]) that, where "personal injuries" is defined in a statute using the normal phraseology, as including "disease and any impairment of a person's physical or mental condition" but without more, it does not encompass an action for defamation, which, in contrast, involves damage to a person's reputation. Section 3(2) of the 1958 Act defines personal injuries in those terms and therefore does not include defamation.

[33] It follows from this that the Lord Ordinary erred in considering that section 1(1A) of the 1958 Act applied to the pursuer's case. That was an error in favour of the pursuer. His decision would presumably have been the same had he considered the correct section 1(1),

since he would not have required to find reasons special to the case in order not to award interest. It is to section 1(1) and its effect on the common law that the court must turn.

Interest at Common Law and the effect of section 1(1)

[34] The law in relation to interest was comprehensively analysed by Lord Reed, delivering the opinion of the court, in *Wilson* v *Dunbar Bank* 2008 SC 457 and again by the Lord President (Hamilton), delivering the Opinion of the Court, in *JM* v *Fife Council* 2009 SC 163. It is not necessary to repeat those analyses, but a resumé with the addition of some references to cases of particular significance to the present one may prove useful. Lord Reed dealt first (at para [22] *et seq*) with the position at common law, notably the general principle, stated in *Carmichael* v *Caledonian Railway Co* (1870) 8M (HL) 119 (Lord Westbury at 131) that interest is due when money has been "wrongfully withheld and not paid on the day when it ought to have been paid" (see also *Wisely* v *John Fulton (Plumbers)* 2000 SC (HL) 95, Lord Hope at 98). It is of some considerable note that in *Carmichael* interest ran from the date of the verdict of a jury assessing the value of excavated stone under the relevant private Act of Parliament (see interlocutor at 135).

[35] Interest runs "*ex mora debitoris*"; that is on account of the debtor's delay. In ordinary debt cases money will be held to have been wrongfully withheld from the date of a judicial demand for payment (ie citation). In the case of damages, since they do not become liquid debts until quantified by the court (or other formal body), the general rule was that interest ran only from the date of decree (*Wilson* v *Dunbar Bank* (*supra*) at para [30]; *JM* v *Fife Council* (*supra*) at para [22]; see also *Dalmahoy & Wood* v *Magistrates of Brechin* (1859) 21 D 210). At the beginning of the last century, it was said not to be the practice in the Court of Session to award interest between the date of a Lord Ordinary's interlocutor and the decision of the

Inner House (*Roger* v *J & P Cochrane* 1910 SC 1, LP (Dunedin) at 3; see also *McCormack* v *National Coal Board* 1957 SC 277) even though the House of Lords had a specific statutory power to do this (Court of Session Act 1808 s 19; cf *McGovern* v *James Nimmo & Co* 1938 SC (HL) 18 Lord Atkin at 29-30).

[36] There was, however, a discretion to award interest from the date upon which a jury's verdict ought to have been applied or, presumably, the date when a Lord Ordinary had advised the case, at least where there had been unjustified delay on the part of the defender in pursuing a motion for a new trial (*Clancy* v *Dixon's Ironworks* 1955 SC 17) or a reclaiming motion. In *Flensburg Steam Shipping Co* v *Seligmann* (1871) 9 M 1011, the Lord President (Inglis, at 1014) awarded interest from the date when the verdict could have been applied, but for a motion for a new trial, in circumstances in which he held the motion to be groundless and absurd. The Lord President had also presided over the trial. In *FW Green & Co* v *Brown and Gracie* 1960 SLT (notes) 43, the date of decree upon which interest was to run was taken to be that of the Inner House, and not that of the decision of the House of Lords or the date of the Lord Ordinary's quantification, but that was in circumstances in which the Inner House had reversed the Lord Ordinary and found in favour of the pursuer. Lord Keith said (at 44):

> "Quantification will generally fix the earliest date from which interest can reasonably be taken to run and that will generally coincide with the date of decree, where the pursuer is successful".

This is consistent with the view that damages will be "wrongfully withheld" in circumstances where it has been quantified but not thereafter paid. This is reflected in *British Railways Board* v *Ross & Cromarty County Council* 1974 SC 27 in which the Lord President (Emslie), delivering the opinion of the court (at 39), said that, in claims for statutory compensation, there was no basis:

> "which, in the absence of agreement or provision within the relevant statute itself, would permit the charging of interest before the amounts claimed were agreed to be due, or assessed to be due by an arbiter or by a judge at first instance".

In all of this, as Lord Reed also said in *Wilson* v *Dunbar Bank* (at para [32]), payment of interest *ex mora debitoris* is a form of compensation for delay in the performance of an obligation to pay money. It is not an award for good behaviour and, conversely, it should not be withdrawn as a penalty.

[37] The origins of section 1(1) of the Interest on Damages (Scotland) Act 1958 are instructive. In *Wilson* v *Dunbar Bank* (at para [40]), it is recorded that the Law Reform Committee, in their Third Report (Cmnd 141, 1957), considered the issue of interest prior to a jury's verdict or a judge's interlocutor. They had recommended the date of citation rather than the date when the cause of action arose, as they did not think it was equitable for a defender to be found liable to pay interest on damages from a date earlier than that on which he had received a formal claim for payment. Nevertheless, according to the Committee (at para 3) justification for opting for the earlier date could be found, as it had been for England and Wales (English Law Revision Committee (Cmnd 4546, 1934, paras 8 and 9), on the basis that:

> "when the court makes an award of damages it in effect decides that the defender should have admitted the claim when it was made and that he should then have paid the appropriate sum in damages… [A] more important reason for making such a departure is the practical consideration that it would remove the interest which a defender at present generally has in delaying proceedings".

[38] The original form of section 1(1) of the 1958 Act permitted interest prior to decree but only from citation and even then only "if the circumstances warrant such a course". In *Macrae* v *Reed and Mallik* 1961 SC 68, this was interpreted as meaning that a sum, which was ultimately awarded as damages, could be seen as being unlawfully withheld from the date

of citation. The application of interest prior to decree remained discretionary but, by that, the Lord Justice Clerk (Thomson) meant (at 74) that the Lord Ordinary was not simply to award interest on the total sum from citation but was to work out, in a selective and discriminating way, which part of the sum awarded was money of which the pursuer "had been made to stand out". Interest fell to be awarded "only where there is a principal sum, which, but for the law's normal delays, the pursuer would have enjoyed". Lord Mackintosh (at 80), referred to the intention of the Act being to "compensate" the pursuer "for being kept out of his money and so deprived of its use throughout the progress of a litigation through no fault of his own".

[39] The Interest on Damages (Scotland) Act 1971 not only introduced a new section 1(1A), it also significantly amended section 1(1) to read as follows:

> "Where a court pronounces an interlocutor decerning for payment by any person of a sum of money as damages, the interlocutor may include decree for payment by that person of interest, at such rate or rates as may be specified in the interlocutor, on the whole or any part of that sum for the whole or any part of the period between the date when the right of action arose and the date of the interlocutor".

This was interpreted by the Lord Ordinary (Emslie) in *Smith* v *Middleton* 1972 SC 30 (at 38-39) as meaning that interest should be payable on "those parts of the whole sum of damages payment of which to a pursuer has been withheld through the particular litigation's normal delays". The selective and discriminating element of the task is essentially to divide up the sums into past and future components and to award interest on the past elements at an appropriate rate. This task became compulsory in personal injuries actions in terms of the new section 1(1A), whereby, in that category of case, the interest becomes a component element of the damages upon which further interest will be due from the date of decree.

[40] The concept that interest was to compensate a pursuer for not receiving his damages at the point when he ought to have been paid was emphasised in *Boots the Chemist* v *GA Estates* (*supra*). The Lord Justice Clerk (Ross) said (at 495-6):

> "Where a delict had been committed, the delinquent is liable to pay damages. In the normal case, however, the amount of damages cannot be quantified there and then, and damages cannot be regarded as being wrongfully withheld at a date when they are incapable of quantification. On the other hand, even though damages have not been quantified, if they become capable of ascertainment then the injured party can properly be regarded as standing out of his money, and the damages can be regarded as being wrongfully withheld ...
>
> …[T]he mere fact that a right of action arose on a particular date does not per se justify an award of interest from that date, but… interest may properly be awarded from a date when the damage suffered was capable of ascertainment (*Bell's Sports Centre* v *Briggs & Sons*). This appears… to be consistent with the principle adverted to by Lord Keith …in *FW Green & Co* v *Brown and Gracie* [(*supra*)]… where he observed of damages for breach of contract that quantification would generally fix the earliest date from which interest could reasonably be taken to run. … [H]owever, even if damages have not been quantified, interest may reasonably be held to run from a date when the damages may reasonably be regarded as quantifiable or capable of ascertainment. From that date the wrongdoer can reasonably be regarded as wrongfully withholding the damages."

[41] The *dicta* in *Boots the Chemist* v *GA Estates* (*supra*) was followed in *Bhatia* v *Tribax* 1994 SLT 1201 in which Lord Cullen, distinguishing *Nacap* v *Moffat Plant* 1986 SLT 326, rejected (at 1204) the submission that even inordinate delay in prosecuting an action should not *per se* deprive a pursuer of interest on past losses. It was cited with approval in *Wilson* v *Dunbar Bank* (*supra* at para [55]) and again in *JM* v *Fife Council* (*supra* at para [27]). In each case the repeated emphasis is on interest as compensation for a pursuer not receiving his damages when they ought to have been paid, rather than the conduct of the parties during the progress of the case. In *Baigent* v *British Broadcasting Corporation* 2001 SC 281, the judge at first instance had awarded the pursuers certain sums as damages for defamation. In refusing a reclaiming motion, the Extra Division specifically stated (at para [31]) that the awards of

interest made by the judge (presumably in relation to a period prior to decree) "will stand" and that interest on "all sums due under these decrees from its date until payment" would be awarded at 8% per annum.

[42] In *Tait* v *Campbell* [2003] Rep LR 35, the Extra Division had, in January 2003, refused a motion by a pursuer for a new trial in an action for personal injuries sustained in 1996. The trial had taken place in June 2001, when the jury made a variety of awards in respect of the different elements of damage in terms of the issue. As at the date of the verdict, interest on the various elements was calculated at a sum which, when added to the principal sums (as required under section 1(1A)), totalled £7,198. This presumably involved the application of conventional rates for past losses from the date of the accident. When the case reverted to the Lord Ordinary (Lady Paton) to apply the verdict in November 2003, she awarded interest on the total sum (principal plus interest) from a date seven days after the verdict until payment. The Lord Ordinary reasoned:

> "[28] ... The jury's verdict on 7 June 2001 represented a full and final quantification of the damages to which the pursuer was entitled, in the same way as a Lord Ordinary's judgment…. A motion to apply the verdict could have been enrolled immediately, and would in all probability have been granted by 14 June 2001. The fact that either the pursuer or the defender or indeed a third party might enrol for a new trial, thus delaying the application of the verdict for what could be a considerable period of time, cannot… disentitle the pursuer from receiving the full rate of judicial interest which would have run had the damages been quantified and awarded by a judge. It might be suggested that the pursuer should only be entitled to that rate of interest where another party (and not the pursuer) challenged the jury's award. But in the exercise of my discretion, …only quite in exceptional circumstances should a pursuer suffer a lower award of interest as a result of the passage of time arising from the exercise of what is an undoubted right to seek a new trial…
>
> [29] It was contended that the defender would be penalised by having to pay interest on the jury's award at the rate of 8 per cent per annum, particularly where the jury trial ended on 7 June 2001, and current interest rates offered by banks and other institutions were considerably lower than 8 per cent. However… the court has to look to the principles underlying the claim for judicial interest, and not to the rates of interest, judicial or institutional, which might be available. Adopting such an

> approach, I am unable to accept any suggestion that the pursuer is not entitled to interest at the judicial rate from the date upon which the verdict would have been applied but for the making of the motion for the new trial (cf Hajducki [: *Civil Jury Trials*] para 6-60)."

Conclusions

[43] Several principles can be derived from this. First, there is no *rule* at common law that interest is not payable on damages until the decree of the court of final appeal. The Lord Ordinary was in error in this respect. Although originally at common law there was an emphasis on the need for the liquidation of damages before interest could run, and hence a stress on the need for a decree, where there had been a quantification of damage at an earlier date, interest could run from that date (*Carmichael* v *Caledonian Railway Co (supra)*, at 135; *FW Green & Co* v *Brown and Gracie (supra*), Lord Keith at 44). After all, if payment of interest *ex mora debitoris* is a form of compensation for delay in the performance of an obligation to pay money (*Wilson* v *Dunbar Bank (supra)*, Lord Reed at para [23]), there is no reason in principle for it not to be awarded at least from the point of formal quantification to the time of payment.

[44] Secondly, there has always been a discretion to award interest from the date when a jury's verdict could have been applied (*Flensburg Steam Ship Co* v *Seligmann* (*supra*); *Clancy* v *Dixon's Ironworks* (*supra*)) or that when a Lord Ordinary has advised the case. Where quantification had not occurred prior to decree, and the decree in the pursuer's favour was that of an appellate court, the date of that decree would be taken as that from which interest would run. Thirdly, in so far as some cases express the view that quantification occurs only when a final court of appeal pronounces judgment, and that it was not the practice to grant interest between the Lord Ordinary's interlocutor and the appellate decerniture (eg *Roger* v *J&P Cochrane* (*supra*)), these cases, in their application to situations where there has been a

jury's verdict or a judge's interlocutor which is upheld on appeal, are inconsistent with the principle behind an award of interest and with the *dicta* to the effect that interest should run at least from the date of quantification. This is because it is from that date, at the latest, that the pursuer, if he eventually wins, has been out of pocket and unable to use the damages to which he is later found entitled to be paid (*Boots the Chemist* v *GA Estates* (*supra*, LJC Ross at 495-6)). It is from that initial standpoint that the Lord Ordinary ought to have assessed the matter. This critical aspect appears to have been overlooked in his exercise of discretion, which was based at least in part on whether the defenders' pursuit of a new trial had been justified by the pursuer's conduct.

[45] Even assessing this matter at common law, therefore, the pursuer ought to have been entitled to interest from the date when the jury's verdict would, but for the motion for a new trial, have been applied. If that were not correct, and the defenders' submission in its most extreme form were to be sustained, two absurdities would arise. First, interest on an award by a jury would differ from that on the Lord Ordinary's interlocutor. Whatever may have been the practice in the past, at least since the 1971 Act, when the Inner House refuses a reclaiming motion and adheres to the interlocutor of the Lord Ordinary, it is a decree in terms of the Lord Ordinary's interlocutor that is extracted and upon which interest runs *ex lege* at the judicial rate. Secondly, whereas the Lord Ordinary may now award interest in terms of the amended section 1(1) of the 1958 Act from the date when the cause of action arose, that interest could cease to run pending Inner House proceedings because the award of damages would then be deemed not to be wrongfully withheld during the appellate process, even although that process has failed.

[46] It may be that the above analysis is at least partially redundant, because it is not disputed that the Lord Ordinary did have a discretion to award interest under the amended

1958 Act from the date when the right of action arose until the date of payment. Sections 1(1) and 1(1A) are designed primarily to allow the court of first instance (the court normally decerning for payment) a discretion to grant interest prior to decree (including the application of a jury's verdict). They are not intended to deal with the situation post decerniture or in this case when, in reality if not in strict jury trial theory and practice, the jury has pronounced its verdict. Since 1971, the court has not required to be positively satisfied in any damages claim that the circumstances warrant the grant of interest. The critical feature in any case, at least since *Macrae* v *Reed and Mallik* (*supra*), is to view the question of interest from the standpoint of it being compensation for the pursuer being "kept out of his money" (*ibid* Lord Mackintosh at 80). It is true that there are references to the pursuer being deprived of his money "through no fault of his own" (*ibid*), or through "normal delays" (*Smith* v *Middleton* (*supra*), Lord Emslie at 38-39), but fault or the length of delay should seldom enter the equation when it is compensation for not having the money that is important, and not whose fault that might be. In a case therefore where there has been a verdict of a jury or quantification by a judge, there is very little, if any, room for the exercise of what may technically be the exercise of a discretion under section 1(1) or at common law because the verdict has not been applied or the verdict or interlocutor has been suspended by the intercession of appellate proceedings. In such cases, the almost inevitable conclusion will be that money has been wrongfully withheld from the time when the verdict could have been applied or that when the interlocutor was pronounced. The Lord Ordinary has erred in not recognising this and in proceeding to exercise his judgment based to a large extent on the conduct of the pursuer.

[47] Although concerned with section 1(1A), the court endorses the reasoning in *Tait* v *Campbell* (*supra*). Even though it was the pursuer who had delayed matters by moving for a

new trial, interest was still awarded on the damages found due. It ran from the date when the verdict ought to have been applied, but for the Inner House proceedings. As Lady Paton said, the jury's verdict quantified the damages in the same way as a Lord Ordinary's interlocutor. Delaying the application of the verdict cannot, in the modern era, disentitle a pursuer from receiving the full rate of judicial interest which would have followed the interlocutor of a judge. No doubt, however, as Lady Paton also said, there may be exceptional circumstances. That is, in essence, what the Lord Ordinary has said that he found.

[48] If the matter were to be analysed on the basis that the Lord Ordinary's decision in declining to award post verdict interest, were to be looked at on the basis of the exercise of a discretion, that exercise is flawed, not just because it proceeds upon the basis of the errors of law already described, but because it fails to take into account relevant considerations, takes account of irrelevant ones and amounts to a decision that is unreasonable in the sense of being "plainly wrong" (*AppA* v *Scottish Daily Record* 2008 SC 145, Lord Nimmo Smith, delivering the Opinion of the Court, at para [7] and citing *Britton* v *Central Regional Council* 1986 SLT 207, LP (Emslie), delivering the Opinion of the Court, at 208 and *Thomson* v *Glasgow Corporation* 1962 SC (HL) 36, Lord Reid at 66).

[49] The reasons special to the cause which the Lord Ordinary found relevant were, first, that the defenders had not caused any unreasonable delay (and thus had not wrongfully withheld payment) given that the grounds for a new trial were "anything but frivolous". He held that the defenders were not responsible for the time taken to resolve the appeal and payment of the principal sum. The reasons for these matters, according to the Lord Ordinary, lay in the criminal prosecution which arose out of the pursuer's own conduct. This analysis contains significant flaws. First, it was the defenders who initiated a motion

for a new trial, in the knowledge that this could delay payment, and secondly, and most important, they failed in their attempt to have the jury's verdict overturned. The fact that they were unsuccessful ought to have been the central feature of the Lord Ordinary's thinking rather than the fact that the defenders had had arguable grounds to pursue. Interest as a form of compensation cannot be dependent on the arguability of grounds of appeal which fail. The defenders were not obliged to enrol for a new trial. Having done so and the motion having been refused, it hardly rests with the defenders to blame the pursuer for any delay in payment. This is quite apart from the subsidiary point that it was the defenders who, in September 2007, had been content with the sist being granted in the face of opposition from the pursuer, in respect of criminal investigations which were, after all, instigated at their request. No doubt the pursuer's resistance to the sist being recalled in 2012 was relevant, but it pales into insignificance when compared to the central point that this was the defenders' motion for a new trial and it singularly failed.

[50] It is not possible either to agree with the Lord Ordinary's view that many would find it difficult to comprehend the inclusion in the verdict of a further £200,632 or £173,159. There is no difficulty at all in understanding that a person who is defamed, and to whom a jury awarded £200,000 as damages for the effect on his reputation, such as it may have been, should be entitled to interest on that sum from on or about the date of the award until payment as compensation for the loss of use of that money. This again amounts to the taking into account of an irrelevant consideration.

[51] The short point here is that, if the Lord Ordinary considered, as he clearly did, that the pursuer's conduct was unreasonable or improper, that could have been reflected in the award of expenses, even to the extent of awarding the defenders the, or some of the, expenses of the Outer House process (*Grubb* v *Finlay* 2018 SLT 463, LP (Carloway),

delivering the Opinion of the Court, at para [39], following *Ramm* v *Lothian and Borders Fire Board* 1994 SC 226, LJC (Ross), delivering the Opinion of the Court, at 227). The same could have been done by the Extra Division in relation to the Inner House proceedings. Notwithstanding his conduct, the pursuer secured a general award of expenses both at first instance and in the appellate proceedings.

Dates and Rates

[52] Technically, the award of damages in a personal injuries cases is inclusive of any interest in terms of section 1(1A), since the power on the court is to "include" interest in the sum decerned for as damages (*Orr* v *Metcalfe* 1973 SC 57). The issue, which is provided to a jury, does not invite them to do the same. It is for the judge to add interest when the verdict is applied. The judge will include the interest which he has calculated and the total will be included in the decree upon which judicial interest will run *ex lege* (ie interest on interest). For this reason, if a pursuer wants interest from a date earlier than the date of decree, he is advised (*MacDonald* v *Glasgow Corporation* 1973 SC 52) to divide up the claimed pre and post decree damages in his issue to enable the judge to apply interest at an appropriate rate (eg half the judicial rate on accumulating past losses). A pursuer has to recognise that, if he does this, he may open up greater scope for a new trial on the basis of errors in the quantification of component parts. A pursuer may thus elect not to do so, in which case the judge may not feel able to grant any interest prior to decree if he has no information on the apportionment of past and future losses (cf *Ross* v *British Railways Board* 1972 SC 154).

[53] In a non-personal injuries case, interest is awarded from a selected date until payment without any break at the point of decree. In the normal case, therefore, there is no purpose in seeking interest over two different periods. When decree has been pronounced,

interest will run at 8% *per annum*. Since decree ought, but for the unsuccessful motion for a new trial, to have been granted on or about 11 August 2006 (7 days after the verdict) interest should run from at least then. In relation to the rate, again because decree ought to have been granted on or about 11 August 2006, it ought to run at the judicial rate of 8% *per annum* from then. In the absence of any breakdown of pre and post verdict losses, the court is not inclined to grant interest prior to that date, even though it could have attempted to make a rough estimate (*Ross* v *British Railways Board* (*supra*). It did not hear any detailed submissions on what the breakdown might have been.

[54] An argument has been presented whereby the court could, were it to have a discretion, apply a lower rate of interest. Because the interest to be applied is, for the reasons given, to be regarded as the equivalent as that on a decree, and since that judicial rate is fixed at 8% *per annum*, the court will not accede to that request. If the matter had been truly discretionary, although the court could have followed the approach in *Farstad Supply* v *Enviroco* 2013 SC 302, in which a lower rate of 4% was selected for pre decree interest, having regard to the reduction of the bank base rate to 2% in late 2008, the court in *Farstad Supply* made it clear (at para [18]) that the court must generally be guided by the judicial rate. Although the court did express (at para [31]) concerns about what it regarded as a mismatch between the judicial rate and "interest rates prevailing in the financial world" and suggested that the matter be considered urgently, there has been no change. This is so even if the official rate of return on investment for the purposes of calculating future loss has dropped from 2.5% to -0.75% (Damages (Personal Injury) (Scotland) Orders 2002 and 2017), whereas the rate payable on late commercial debts is 8% above bank base rate (Late Payment of Commercial Debts (Rate of Interest) (Scotland) (No. 2) Order 2002). If the court were to look at the realities, it would have borne in mind that private individuals, who are not

particularly wealthy, are more likely to be affected by the rates applicable to mortgages and credit cards, than those available to large commercial concerns.

[55] The reclaiming motion will be allowed and the Lord Ordinary's interlocutor of 8 March 2018 recalled in so far as its refusal to award any interest. *Quoad ultra* the court will adhere to the Lord Ordinary's interlocutor. Interest will run on the jury's verdict at the judicial rate of 8 per cent per annum from 11 August 2006 (the date when the verdict could have been applied) until 30 May 2017, the date when the defenders paid the principal sum.